UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

ROSE STEWART,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Docket No. 98-106-P-C***
	)	
HOYT'S CINEMAS CORPORATION,	***)***	
	)	
Defendant	***)***	

RECOMMENDED DECISION ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

The defendant has moved for summary judgment in this action arising out of a slip and fall at a movie theater in 1992. I recommend that the court deny the motion.

I. Summary Judgment Standards

Summary judgment is appropriate only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "In this regard, 'material' means that a contested fact has the potential to change the outcome of the suit under the governing law if the dispute is resolved favorably to the nonmovant. By like token, 'genuine' means that 'the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party . . . .'" *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995) (citations omitted). The party moving for

summary judgment must demonstrate an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences in its favor. *Cadle Co. v. Hayes*, 116 F.3d 957, 959 (1st Cir. 1997). Once the moving party has made a preliminary showing that no genuine issue of material fact exists, "the nonmovant must contradict the showing by pointing to specific facts demonstrating that there is, indeed, a trialworthy issue." *National Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 735 (1st Cir. 1995) (citing *Celotex*, 477 U.S. at 324); Fed. R. Civ. P. 56(e). "This is especially true in respect to claims or issues on which the nonmovant bears the burden of proof." *International Ass'n of Machinists & Aerospace Workers v. Winship Green Nursing Ctr.*, 103 F.3d 196, 200 (1st Cir. 1996) (citations omitted).

II. Factual Background

The parties have presented the following undisputed facts, appropriately supported by citations to the record. On December 12, 1992 the plaintiff attended a Christmas party sponsored by her employer at a theater complex in Biddeford, Maine, which was owned by the defendant. Deposition of Rose Stewart ("Plaintiff's Dep.") at 27-28; Deposition of Deena M. Stewart ("Stewart Dep.") at 5, 8-9. The plaintiff was accompanied by her grandchildren, ages 7 years and 19 months. Plaintiff's Dep. at 24. The plaintiff bought two bags of popcorn and two sodas in the lobby of the theater. *Id.* at 41. She and her grandchildren then entered the theater where the movie "Home Alone II" was to be shown, approximately 15 minutes before the movie was scheduled to start at 9:00 a.m. *Id*. at 35-36, 42. They took seats next to the wall in the fourth row from the back of the theater. *Id*.

at 24, 43. No one else sat in that row. *Id*. at 65.

As she entered the theater and the row where she and her grandchildren sat, the plaintiff did not notice the condition of the floor, did not see any spilled popcorn or soda on the floor, and did not feel any slippery substance on the floor. *Id*. at 45-48. Approximately ten minutes after the movie started, the plaintiff's 19-month-old grandson injured his mouth on the seat he was occupying. *Id*. at 51-52. The plaintiff picked up her grandson and began to walk toward the end of the row of seats. *Id*. at 61. At the end of the row of seats, before stepping into the aisle, the plaintiff stepped into a slippery substance with her right foot and fell down, coming to a stop under the aisle seat in the row in front of the row where she had been sitting. *Id.* at 62, 64, 65-66, 69. The plaintiff was helped up by two co-employees, one who had been sitting in the seat under which she ended her fall, and one who had been sitting with three members of his family in the four seats nearest the aisle in the row behind the one in which the plaintiff had been sitting. *Id.* at 54, 66, 69.

The plaintiff was escorted to the ladies' room at the theater by another co-employee, where she and her grandson were assisted by her employer's company nurse. *Id*. at 70-71. The manager of the theater complex, Deena Stewart, spoke with the plaintiff while she was in the ladies' room. Affidavit of Deena Stewart ("Stewart Aff.") (Docket No. 5) ¶¶ 1, 7. Deena Stewart completed a written incident report about the plaintiff's fall that day. *Id*. ¶ 11.

The theater complex was cleaned on a nightly basis by employees of A Plus Cleaning, who had cleaned it the night of December 11-12, 1992. *Id*. ¶¶ 5-6. Deena Stewart was not notified of any spilled popcorn, butter or other slippery substances on the floor of the theater where the plaintiff fell before being informed of the presence of such a substance by the plaintiff. *Id*. ¶ 12. The plaintiff informed Deena Stewart that she fell on popcorn and butter that had been spilled during the show

she was attending. *Id*. ¶ 13. The family sitting in the four seats next to the aisle in the row behind the row in which the plaintiff had been sitting included a 1-year-old and a 2-year-old, both of whom were holding popcorn. Deposition of Robert L. Brown ("Brown Dep.") at 29–30.

A Plus Cleaning sometimes used a leaf blower to blow debris from the theater. Stewart Dep. at 46. The cleaning company's employees may occasionally have missed a spill or a spot. *Id*. at 47. On December 12, 1992 the theater manager did not inspect the theater in which the plaintiff fell before opening it. *Id*. at 24-25. William Heffernan, the co-employee who occupied the seat beneath which the plaintiff fell, noticed a slippery substance directly under his feet beneath the seat in which he was sitting. Affidavit of William Heffernan ("Heffernan Aff.") (Docket No. 14) ¶¶ 5-9. He did not see anyone spill anything in his row or in the row where the plaintiff was sitting. *Id*. ¶ 10. A theater employee who was sent by the manager to clean the area after the plaintiff fell reported finding butter from popcorn on the floor. Stewart Dep. at 17, 21.

The plaintiff filed the complaint in this action, alleging negligence, on April 6, 1998. Complaint (Docket No. 1).

III. Discussion

The defendant contends that it is entitled to summary judgment on the plaintiff's sole claim against it because the plaintiff cannot "sustain her burden of proving the Defendant's negligence by establishing (1) that the Defendant caused the substance to be there, or (2) that the Defendant had actual knowledge of the existence of the foreign substances, or (3) that the foreign substance was on the floor for such a length of time that the Defendant should have known about it." Memorandum of Law in Support of Hoyt's Cinema Corporation's Motion for Summary Judgment ("Defendant's

Memorandum") (Docket No. 7) at 1. The defendant also argues that the plaintiff cannot meet her burden of proof on the breach of a duty of care running from the defendant to the plaintiff. *Id*. at 1-2. The defendant relies primarily on *Milliken v. City of Lewiston*, 580 A.2d 151 (Me. 1990), to support its argument.

The plaintiff responds that there is evidence from which a jury could properly infer that the slippery substance had been on the floor long enough for the defendant to have learned of its presence and removed it. Plaintiff's Memorandum of Law in Support of the Plaintiff's Opposition to the Defendant's Motion for Summary Judgment ("Plaintiff's Opposition") (Docket No. 12) at 1.

In *Milliken*, the plaintiff slipped on a piece of green pepper on the floor near a self-service salad bar in a school cafeteria. 580 A.2d at 152. Noting that the defendant owed the plaintiff a "duty of exercising reasonable care in providing reasonably safe premises for [her] use," the Law Court "adhere[d] to the rule that duty and liability are determined by the existence of actual or constructive knowledge." *Id.* It set forth the evidentiary burden on a plaintiff seeking to recover for negligence causing a slip and fall due to a foreign substance on the floor as follows:

> When a foreign substance on the floor causes a member of the public to sustain injuries, the injured party ordinarily bears the burden of proving the defendant's negligence by establishing (1) that the defendant caused the substance to be there, or (2) that the defendant had actual knowledge of the existence of the foreign substance, or (3) that the foreign substance was on the floor for such a length of time that the defendant should have known about it.

Id. Contrary to the defendant's position, a plaintiff need not offer evidence concerning the existence of a duty or the breach of that duty in addition to evidence meeting one of the three variations of the burden set forth above. *Id.* The plaintiff has chosen to rely on only the third variation in her opposition to the motion for summary judgment.

The defendant argues that the plaintiff has offered no evidence that it should have known about the substance on which she slipped and that it could not reasonably be expected to clean up popcorn spilled by anyone viewing the film along with the plaintiff. Defendant's Memorandum at 8. It relies on its assertion that "[t]he theatre in which the Plaintiff was seated to watch the film with her grandchildren was clean and free of debris before the employees from Saco Defense arrived on the morning of December 12, 1992." *Id.* However, even if that statement could be interpreted to mean that the theater was free of any butter on the floor, it is not supported by the record, because Deena Stewart, the affiant who made that statement, did not inspect the theater herself that morning, Stewart Dep. at 24-25, and relies only on the fact that no one reported to her any spilled popcorn, butter or other slippery substance on the floor that morning before the plaintiff's fall, Stewart Aff. ¶ 12.

The plaintiff responds that "[t]he evidence is consistent with the popcorn having been cleaned the previous evening and the butter left behind by the cleaning method used." Plaintiff's Opposition at 5. She relies on the factual assertions that neither she, Heffernan, Brown, nor the theater employee who cleaned the area after her fall saw any popcorn in the area and that the theater manager stated that the only way butter could be on the floor would be through the spilling of popcorn. *Id*. at 6. The record reflects that Heffernan saw no popcorn "that had been spilled at the point where [the plaintiff] fell" or "at [his] seat," Heffernan Aff. ¶ 9,[1] and that the plaintiff saw no popcorn on the floor when she first entered the row, Plaintiff's Dep. at 48. Brown did not notice anything on the floor when

[1] Counsel for the plaintiff is reminded that the citation "affidavit of William Heffernan," Plaintiff's Statement of Material Facts Offered in Opposition to the Defendant's Motion for Summary Judgment ("Plaintiff's SMF") (Docket No. 13), ¶¶ 13, 16 & 17, without specification of the paragraph of that affidavit to which reference is made, is not a sufficient record citation under this court's Local Rule 56.

he walked into the row behind the row in which the plaintiff was sitting. Brown Dep. at 23. The evidence concerning the theater employee is that he told the manager that there was butter on the floor "[f]rom popcorn that had been spilled." Stewart Dep. at 21. The plaintiff has cited no evidence in the record to support an assertion that this employee did not see any popcorn. In fact, the manager resisted this characterization of the employee's statement to her during her deposition. *Id.* at 20. Finally, the manager did state that "[t]he only way you are going to get butter on the floor in those theaters is if someone has popcorn and you drop the popcorn and it has butter on it." *Id.*[2]

The defendant responds that the plaintiff has "failed to produce any evidence whatsoever that the Defendant did not exercise reasonable care in providing reasonably safe premises for her use." Defendant's Reply Memorandum to Plaintiff's Opposition to Defendant's Motion for Summary Judgment (Docket No. 15) at 2 (emphasis in original). It argues that an inference drawn from the cited evidence to the effect that a slippery substance had been on the floor where the plaintiff fell since the night before "is absurd and totally unreliable." *Id*. This is so, defendant contends, because 25 to 30 minutes passed between the time the plaintiff first entered the row and the time she fell, she did not notice any slippery substance when she entered the row, and there were other patrons near the spot where she fell in the 25 to 30 minute period. *Id*. at 2-3. The defendant also finds significant the fact that Heffernan does not state specifically in his affidavit that he felt a slippery substance under his chair before the plaintiff fell, and "it is equally likely that he noticed the slippery substance at or around the same time period when Ms. Stewart fell." *Id.* at 3.

The defendant's interpretation of the evidence is not the only possible one. Inferences

[2] The plaintiff's SMF erroneously places this statement at page 29 of the deposition transcript. Plaintiff's SMF ¶ 20.

favorable to the plaintiff may reasonably be drawn from that evidence. The defendant's own choice of language supports this conclusion. If "it is equally likely" that either of two inferences, leading to different outcomes, could be drawn from certain evidence, summary judgment is not appropriate. *In re Varrasso*, 37 F.3d 760, 764 (1st Cir. 1994). The defendant's arguments essentially go to the weight of the evidence, a matter reserved to the jury. The evidence in the summary judgment record does not foreclose the possibility that a reasonable jury could find that the plaintiff slipped on butter that had not been removed from the floor of the theater the night before the plaintiff attended the first showing of the day and that the spilled butter, a possible hazard of which theater owners and managers must generally be aware, had been on the floor long enough under the circumstances that the defendant should have known about it. Nothing further is required to make the entry of summary judgment for the defendant inappropriate in this case.

IV. Conclusion

For the foregoing reasons, I recommend that the defendant's motion for summary judgment be **DENIED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 18th day of December, 1998.

David M. Cohen
United States Magistrate Judge